

1 complains about the absence of minority programming. It's
2 well-known that the Commission does not get into what
3 programming a licensee broadcasts. That was established --
4 FCC with WMCM Listener's Guild, 450 U.S. 582, 1981. The
5 Commission will not tell a licensee that it must air more
6 European classical programming or more African-American
7 classical programming.

8 MR. HONIG: Your Honor, oh, I'm sorry.

9 MR. ZAUNER: The Bureau supports the objection.

10 MR. HONIG: Your Honor, NAACP versus Federal Power
11 Commission, 425 U.S. 662, footnote 7, 670, 1976, pointed out
12 that the EEO rule is intended to enhance diversification of
13 information. And to that extent or at least that limited
14 purpose the reference to programming is offered, but it's also
15 offered in response to a statement that was admitted this
16 morning with regard, it was in Reverend Bohlmann's testimony
17 regarding the stations having, with the, the, having a policy
18 to program the stations in a way which is nondiscriminatory.
19 There is the case Office of Communication -- Church of Christ
20 versus FCC, the first one where there was a designation
21 359 F2d 994, which, which is still good law, which spoke to
22 the question of it being a proper hearing issue related to
23 discrimination but which inferences I would think as to
24 discriminatory intent can be raised as to the exclusion of
25 blacks from stations' programming. This witness is very well

1 qualified to speak to this. He's a listener of the station.
2 He's a music professor at the University of Missouri,
3 St. Louis. Whether he has knowledge of the hiring policies is
4 something that he can be tested on when he testifies, but he
5 certainly has knowledge and it is a very specific knowledge of
6 the exclusion of these composers. One of the statements that
7 was made, Your Honor, in the opposition to the petition to
8 deny related to the percentage of African-Americans in the
9 station's audience. That was used as a proxy for the
10 proposition that there weren't African-Americans interested in
11 classical music. And I submit, Your Honor, that we heard an
12 expert who testified yesterday, who said that there are
13 differences between communities in listenership and
14 demographics and so forth in classical radio, and I submit
15 that what has happened here is that one reason for those
16 statistics is this isn't the station, and our record will show
17 this, which has, which has integrated its programming. It is
18 in that sense inappropriate to rely on those statistics. They
19 put them in, in their own opposition, which is in the record.
20 Now as to the, as to the individuals, the claim is not made
21 that they applied. There are two aspects of, of, of the
22 discrimination issue. One relates to recruitment and one
23 relates to hiring. This isn't offered for the purpose of
24 suggesting that these individuals should have been hired, only
25 for the proposition that it should not have been difficult to

1 find minorities to recruit and he's named several qualified
2 people.

3 JUDGE STEINBERG: NAACP Exhibit 2 is rejected for
4 the reasons stated by Mrs. Schmeltzer. In addition, you
5 haven't established, this exhibit doesn't establish that this
6 individual has the qualifications to state his opinion
7 regarding the qualifications of the named individuals for jobs
8 at radio stations. With respect to paragraph five, the part
9 of paragraph five concerning programming, that's not within
10 the scope of the issue and it's not within the scope of the
11 direct case. And for all of those reasons, singly or
12 collectively, the exhibit's rejected.

13 (Whereupon, the document referred to
14 NAACP Exhibit No. 2 was hereby
15 rejected.)

16 MR. HONIG: Your Honor, before going to the next
17 exhibit, I would like to ask whether this would be an
18 appropriate time, and if it's not I can do it later, to
19 revisit the ruling that was made about the statement on
20 programming in the exhibit that we had this morning.

21 JUDGE STEINBERG: We're not revisiting anything at
22 this moment. We're going to Exhibit Number 3.

23 MR. HONIG: Can I take it up later?

24 JUDGE STEINBERG: We'll see.

25 MR. HONIG: Okay.

1 JUDGE STEINBERG: I, I should say that just because
2 one individual might have certain program preferences or might
3 think that a station should broadcast works by composers such
4 as Ali Wilson (Phonetic), T.J. Anderson (Phonetic), Ulysses K.
5 (Phonetic), etc., etc., rather than uninteresting works by
6 unknown European composers is not a subject matter of this
7 hearing. That's, that's what I was, it's beyond the scope of
8 the issue. So let's, let's turn to Exhibit 3.

9 MR. HONIG: I offer, Exhibit Number 3 is offered.

10 MS. SCHMELTZER: Your Honor, I object to
11 Exhibit Number 3 as being irrelevant and totally unrelated to
12 KFUD, most of the exhibit is inclusive to witness' background,
13 and finally she says at the end, "It is not difficult to
14 locate African-Americans with classical music expertise if one
15 exerts a little effort". None of this is germane to the
16 issues in this proceeding or to KFUD.

17 JUDGE STEINBERG: Mr. Zauner?

18 MR. ZAUNER: We would join in the objection and also
19 note that this also does not appear to rebut anything in the
20 direct case exhibits of the stations.

21 JUDGE STEINBERG: Mr. Honig?

22 MR. HONIG: Again, Your Honor, this is what this
23 case is about, it's difficult to locate African-Americans with
24 classical music expertise. That was the principle affirmative
25 defense that got this case designated for hearing in the first

1 place. This woman is the, is a long-time teacher. She's an
2 associate professor of music at Harris-Stowe College, which is
3 the black college of St. Louis, Missouri. She directs the
4 college choir. She's taught dozens of African-Americans who
5 have classical music interest and expertise. There are
6 statistics in the record that, that, that go to the supposed
7 difficulty in finding African-Americans. An enormous, an
8 enormous number of them could have been found not only through
9 this witness personally or, and through her college, but
10 through individuals that she knew, that she knew.

11 JUDGE STEINBERG: Exhibit 3 is rejected for the
12 reasons stated by counsel for the Church and Bureau counsel.

13 (Whereupon, the document referred to
14 NAACP Exhibit No. 3 was hereby
15 rejected.)

16 MR. HONIG: -- find my copy -- Exhibit 4 is offered.

17 MS. SCHMELTZER: And we object to Exhibit 4 for the
18 reasons previously stated with Exhibits 1, 2, and 3.

19 MR. ZAUNER: The Bureau will join in that objection.

20 JUDGE STEINBERG: Mr. Honig?

21 MR. HONIG: Give me one second?

22 JUDGE STEINBERG: Sure.

23 MR. HONIG: Again, Your Honor, this is an individual
24 with intimate knowledge. She's just ending a two-year term
25 as, as president of the local branch of the National

1 Association of Negro Musicians. She's very familiar with
2 African-American classical musicians, performers, and so
3 forth. Her background in this area goes back to when she was
4 six years old. She testified that she knows quite a number of
5 people who are trained in, teach, and, and have season tickets
6 to the symphony, and thus have expertise in the matters which
7 are the subject of this case and got it designated for
8 hearing.

9 JUDGE STEINBERG: Exhibit 4 is rejected for the same
10 reasons that Exhibit 3 was rejected.

11 (Whereupon, the document referred to
12 as NAACP Exhibit No. 4 was hereby
13 rejected.)

14 MR. HONIG: Exhibit 5 is offered.

15 MS. SCHMELTZER: We object to Exhibit 5 for the same
16 reasons as we previously stated with respect to Exhibits 1
17 through 4. In addition, I would note that pages one through
18 two are devoted to detailing the position of the declarant and
19 have no relationship to the issues in this case. On page
20 three, she says, "KFUO Radio Station has a large Afro-American
21 listening audience". Her competency to make that statement
22 and the basis for that statement are not disclosed.

23 MR. ZAUNER: Your Honor, the Bureau would join in
24 that objection. We also note that the attachments constitute
25 hearsay.

1 JUDGE STEINBERG: Mr. Honig?

2 MR. HONIG: Now the attachments are no more or less
3 hearsay than the attachments to the other exhibits for the
4 other witnesses. She can, when she testifies, be
5 cross-examined about them. In an affirmative action case, I
6 want to first address the affirmative action aspect of this
7 case. What's always an issue is the availability of sources
8 of applicants. The Commission frequently criticizes
9 petitioners to deny because they didn't identify particular
10 sources when -- said, well, he couldn't find any sources. And
11 one of the Commission's findings in designating was that
12 African-American organizations were seldom, if ever, contacted
13 about openings. This lady, who is a long-time NAACP member in
14 the St. Louis branch, is the chairperson and coordinator, and
15 has been for almost two decades, of what is called the Afro
16 Academic Cultural Technological and Scientific Olympics, which
17 is a national program which, which allows black youths to
18 compete in academic and cultural pursuits. She states in her
19 declaration that, that during this time, there have been quite
20 a number of classical music students, including winners of the
21 national competition, who have come from St. Louis and who she
22 knows. I submit that this establishes that the NAACP and her
23 program specifically would have been hard to overlook if a
24 classical station wanted to find African-American employees.
25 As to the last statement on page three, KFUD Radio Station has

1 a large African, Afro-American listening audience, the
2 question of, of her competence I think is, is, is something
3 that can be tested on cross-examination. She is a long-time
4 regular and listener and, and like any other statement, it can
5 be tested on cross-examination, but it certainly is relevant
6 because it is made relevant in the pleadings before
7 designation.

8 JUDGE STEINBERG: I'm going to reserve ruling on
9 Exhibit 5. Go to Exhibit 6.

10 MR. HONIG: Okay. Exhibit 6 is offered.

11 MS. SCHMELTZER: Your Honor, we object to Exhibit 6.
12 This is an entirely conclusory declaration -- the kind of
13 material that if, if Mr. Honig wants to put the information in
14 his proposed conclusions of law, he can do so, but I, we're
15 here to, to get factual findings in the record and this is
16 legal argument, it's conclusions, not factual findings. So I,
17 I, and in addition to that, it, it usurps your function in
18 terms of trying to draw conclusions as to this case and the
19 nature of the evidence. I would also note that the witness is
20 talking about the showing that must be made to prevail on the
21 Title VII claim. This is not a Title VII claim, this is an
22 EEO issue before the FCC. The witness has not established
23 that he's competent to say what KFUE's recruitment practices
24 were or were not, and for all those reasons I object to this.
25 JUDGE STEINBERG: Mr. Zauner?

1 MR. ZAUNER: The Bureau concurs in the Church's
2 objection.

3 JUDGE STEINBERG: Mr. Honig?

4 MR. HONIG: Your Honor, this witness is offered for
5 two purposes. This individual is a professor of law at
6 St. Louis University School of Law. He teaches employment
7 discrimination. He has a long background in the field, and,
8 and I, I'm glad that I didn't hear counsel challenge his, his,
9 his competence and his credibility on the subject. He's very
10 competent. It was offered for two purposes. First, it was
11 offered to assist the Court on the, on these, these matters
12 which don't come up in FCC hearings very frequently. There
13 is, in 1978, the FCC entered into a memorandum of agreement
14 with the EEOC. The cite is 70 FCC 2d 2320. The memorandum of
15 agreement acknowledges that while the wording of Title VII and
16 the FCC's EEO rule differs slightly, they are sufficiently
17 similar that in some circumstances the FCC is authorized to
18 process an EEO claim referred to it. The agencies are
19 supposed to refer each other's charges, so that if a person
20 complains of discrimination before either agency, it is
21 supposed to notify the other and then they'll decide
22 which to investigate. For example, it came up in the
23 Catocin case where there were fewer than 15 employees, so the
24 FCC had to process that case using the same standards. So
25 although these rules are slightly different, they are quite

1 close, and this expert is familiar with both rules and he's,
2 and, and he's in a position to testify on, you know, on the
3 congruent or lack thereof, and they're closely congruent. The
4 governing law that the Commission has applied is not a law
5 that is applied every day. This isn't what the Commission
6 customarily does, which is why individual complaints are
7 usually adjudicated initially at the EEOC, then when there is
8 a final decision, refer to this agency. Because we don't have
9 an individual grievance, but instead we have what amounts to a
10 pattern, it's called a pattern in practice case, an allegation
11 that, that would be somewhat similar to if, if they were
12 before the EEOC, to a class action or a systemic complaint,
13 that is one where there is a particular practice which
14 universally adversely effects members of a particular group.
15 Those are legal questions which if I offered them, they'd just
16 be argument. But I think, I thought it was important enough,
17 since it is unique and since it certainly is -- and relevant
18 to, to the, the exhibits that repeatedly say there's no
19 discrimination, there's no discrimination, there's no
20 discrimination, but that would be helpful to the Court,
21 especially if counsel for, for the Church has an opportunity
22 to test them and to have that -- I think it would be useful to
23 the Court. I certainly see how it would be of no use to the
24 Court and it's offered for that purpose.

25 MS. SCHMELTZER: Well, I, I --

1 JUDGE STEINBERG: Wait. No.

2 MS. SCHMELTZER: -- don't think that would be useful

3 --

4 JUDGE STEINBERG: I, I've heard enough. Exhibit 6
5 is rejected just for the reasons stated by counsel for the
6 Church. I believe that this material should be in proposed
7 conclusions and not in an exhibit because it's legal argument.
8 Okay, let's go to the next one.

9 (Whereupon, the document referred to
10 as NAACP Exhibit No. 6 was hereby
11 rejected.)

12 MR. HONIG: Exhibit 7 is offered.

13 MS. SCHMELTZER: We object to Exhibit 7, Your Honor,
14 because this appears to go to very collateral matters that are
15 not an issue in this case. For instance, there is a long
16 paragraph about the fact that Jan Hutchinson apparently
17 couldn't get along with Mr. Lauher. Whether or not
18 Ms. Hutchinson got along with Mr. Lauher is totally irrelevant
19 to this proceeding. Ms. Hutchinson also purports to talk
20 about whether other sales persons at the station had sales
21 experience, but she hasn't established that she was in a
22 position to know that information. And, in fact, we have
23 records that have been turned over in discovery that reflect
24 that a number of these individuals do have classical music or,
25 or radio experience. Ms. Hutchinson was not in a hiring

1 position or a supervisory position at KFUD. All of the
2 information contained in her declaration is irrelevant,
3 immaterial, and --

4 JUDGE STEINBERG: Mr. Zauner?

5 MR. ZAUNER: We join in the objection as stated. We
6 believe this contains a great deal of collateral matter that
7 is irrelevant to the issue at hand. We also note that the
8 attachment at page five appears to be incomplete. It appears
9 to be a, a letter, but it's not signed and if there's another
10 page to that, it doesn't appear to be here.

11 JUDGE STEINBERG: Mr. Honig?

12 MR. HONIG: Well, first, Ms. Hutchinson was spoken
13 of at length by Mr. Cleary in his testimony yesterday, and is
14 spoken of specifically on page five of Mr. Cleary's testimony
15 which was tabbed to go Exhibit 5. Ms. Hutchinson's statement,
16 and I'll, I'll acknowledge that there are some things in the
17 statement that, that probably are subject to strike.
18 Ms. Hutchinson wrote this statement herself in her own words
19 and she insisted that she wanted to be expansive. Judge, it's
20 very seldom that you get a former employee of a radio station,
21 a person that's still in the market, coming forward as a good
22 samaritan witness in the case. Those witnesses tend to be the
23 very best witnesses you can have. They don't have an axe to
24 grind. They come forward at some personal risk. And I, I
25 think she certainly ought to be saluted for having come

1 forward as she has. The credibility of such a witness is
2 often enormous. Here is a person who worked side by side with
3 these individuals, observed them, knew them, and was certainly
4 hired because of what, what they, what, of her knowledge and
5 ability. The St. Louis Symphony has written her letters that
6 show that here is a person who, in fact, didn't have classical
7 music experience, who they were very happy with, and the
8 St. Louis Symphony was one of the specific client, advertising
9 clients of the stations that was noted in the opposition to
10 the petition, I'm sorry, the November, the December 1992
11 letter in response to the second bilingual inquiry which is in
12 evidence, as a example of the type of client from which you
13 had to had classical music experience. Her declaration is
14 quite specific in paragraph two about these individuals, and
15 the basis for her knowledge is she knew them and she worked
16 with them, whether that sufficient basis can be brought out
17 through cross-examination. But this is the type of, of, of
18 witness that I think the Commission needs, that can't be
19 anything but helpful, and who has been maybe too specific in
20 places but certainly has never been not specific enough in her
21 statement.

22 MS. SCHMELTZER: With, with respect to some of
23 Mr. Honig's arguments, Ms. Hutchinson is now out of the
24 market. She's not in the market. There have been no threats
25 or intimidation as Mr. Honig suggests. We -- Ms. Hutchinson

1 at all. Ms. Hutchinson was a white employee, not a black
2 employee. Apparently, she didn't like Mr. Lauher and she's
3 disgruntled, but that's no basis for calling her in on this
4 type of a case. She has no probative evidence to offer.

5 MR. ZAUNER: (INAUDIBLE).

6 JUDGE STEINBERG: Do you want to comment or -- rule.

7 MR. ZAUNER: Yes, I'd like just to make a, a very
8 quick --

9 JUDGE STEINBERG: Sure.

10 MR. ZAUNER: -- comment and, and that is that the
11 objection is based on relevance and I haven't heard anything
12 addressed to that question by Mr. Honig.

13 MR. HONIG: Hum?

14 JUDGE STEINBERG: Okay. I'm, I'm going to receive
15 most of this exhibit. In my opinion, this is addressed to
16 much of the, what was testified to by Mr. Cleary. However, I
17 am very --

18 MS. SCHMELTZER: May I say that that was not on
19 direct testimony. That was a few questions that the Bureau
20 brought out. It was way beyond, this is way beyond direct --

21 JUDGE STEINBERG: No, this, well, anyway you have my
22 reasons. If you don't like them, you can add them to your
23 list. The only one not keeping a list, I guess, is me. On
24 page one, starting the third line from the bottom, starting
25 with the phrase working conditions through the end of the

1 paragraph management took no action with Mr. Lauher to my
2 knowledge, is stricken as irrelevant. Now in doing that, let
3 me very, let me tell Mrs. Schmeltzer if you request Ms.
4 Hutchinson for cross-examination and if you want to get into
5 this material to try to establish that she's not credible
6 because she's a disgruntled employee, now Mr. Honig would
7 argue that she's gruntled and you would argue that she's
8 disgruntled. I don't know what gruntled means, that was a
9 lame attempt at a joke which only Mr. Zaragoza got. You know,
10 you can do that.

11 MS. SCHMELTZER: May I ask -- additional --

12 JUDGE STEINBERG: Well, there's also in paragraph,
13 the, on page two, the paragraph beginning I worked at eight
14 radio stations. There is a sentence beginning I learned how
15 to be a better person. Through the end of that paragraph is,
16 is irrelevant also, so that will be stricken, beginning with
17 I learned how to be a better person, through behavior to exist
18 within one of their divisions.

19 MS. SCHMELTZER: I would also ask you to strike a
20 little bit in the prior paragraph, beginning with I knew I
21 would never have an opportunity for advancement, through
22 career. The verbal abuse and embarrassment is, you know, a
23 collateral matter as well.

24 JUDGE STEINBERG: Let me strike and forget the
25 verbal abuse and embarrassment. And then you can, you can, if

1 | if you want to bring these matters up to show bias, prejudice,
2 | lack of credibility, that's up to you. Same thing if you want
3 | to point out that what she's stating in here is inaccurate,
4 | you can do it through cross-examination or perhaps a rebuttal.
5 | If you, if you request a rebuttal, we'll argue about that and
6 | I'll make a determination whether you will be permitted.

7 | MS. SCHMELTZER: And I would move to strike page
8 | five because --

9 | JUDGE STEINBERG: Well --

10 | MS. SCHMELTZER: -- the whole letter has not been
11 | supplied.

12 | JUDGE STEINBERG: -- I'll ask Mr. Honig to supply
13 | the entire letter.

14 | MS. SCHMELTZER: Again, it, it talks about the
15 | screaming and foul language --

16 | JUDGE STEINBERG: Well, let's just leave that in
17 | there. That's, that's apparently her resignation letter and
18 | we'll just leave that in there. So you, you contact
19 | Ms. Hutchison (sic) and, and, Hutchinson, and get the whole
20 | letter.

21 | MR. HONIG: Sure.

22 | JUDGE STEINBERG: The whole letter doesn't exist,
23 | then this may just, page five may be stricken.

24 | MR. HONIG: I think it does. It just, we just
25 | realized Friday night that the fax hadn't come through right.

1 JUDGE STEINBERG: So Exhibit 7 --

2 MS. SCHMELTZER: Your Honor, I assume that, that
3 page five cannot be cited for the truth of the matter
4 asserted, but rather just for the fact that it's a resignation
5 letter?

6 JUDGE STEINBERG: This is a resignation letter and
7 you can, you can cross-examine on that, too. It's part of the
8 exhibit.

9 MS. SCHMELTZER: But it's not, but Mr. Honig's not
10 offering it for the proof of the matter asserted therein.

11 MR. HONIG: It's offered for the fact that she
12 resigned and her opinion of these things --

13 MS. SCHMELTZER: Well --

14 MR. HONIG: -- which is, it's her opinion.

15 JUDGE STEINBERG: Well, let's --

16 MS. SCHMELTZER: -- there's no claim that she was
17 wrongfully discharged and, and --

18 JUDGE STEINBERG: She wasn't discharged, she
19 resigned.

20 MS. SCHMELTZER: Right.

21 JUDGE STEINBERG: But anyway, it's there for
22 whatever it's there for.

23 MS. SCHMELTZER: Your Honor, if you let this in for
24 the truth of the matter asserted, then we just -- part of what
25 you -- so I think some of this should come out.

1 MR. HONIG: It's not offered for the truth of the
2 matter asserted.

3 JUDGE STEINBERG: Okay. Let's, let's go on to the
4 next one. So Exhibit 7 is received with the modifications I
5 stated.

6 (Whereupon, the document marked as
7 NAACP Exhibit No. 7 was received into
8 evidence with modifications.)

9 JUDGE STEINBERG: And, but as I said, you're not
10 precluded from inquiring into, just, just because that
11 material was stricken does not preclude you from going into it
12 on, on cross, if you desire.

13 MR. HONIG: Exhibit 8 is offered.

14 JUDGE STEINBERG: Now this is the same
15 Jan Hutchinson?

16 MR. HONIG: This is the same person. This is the
17 second declaration by her.

18 MS. SCHMELTZER: Although this declaration, Your
19 Honor, unlike the previous one, there does not seem to be any
20 relevance to this declaration. She just simply says the same
21 thing about ten different ways, but she is not an expert.
22 Her, I just don't see that this is material to the issues in
23 this proceeding and I don't think that this should come in.

24 JUDGE STEINBERG: Mr. Zauner?

25 MR. ZAUNER: One second. Your Honor, I don't

1 | believe that this is relevant because if I understand the main
2 | thrust of this, it is that the stations claim that sales
3 | person needed, needed classical expertise to establish KFUD
4 | FM's product to advertisers is false. My understanding is
5 | that KFUD FM is not making that claim in this proceeding.
6 | What they said was that in the beginning, they believed that
7 | classical music training would help the sales people in their
8 | selling of the station, but as time progressed they abandoned
9 | that notion and they concede that it is incorrect. I don't,
10 | haven't seen anything in, in, that I can remember, in the
11 | direct case exhibits in which KFUD claims that sales persons
12 | need classical music expertise to sell the station. So I
13 | don't believe that, that this declaration of Jan Hutchinson is
14 | relevant.

15 | MR. HONIG: The best that can be said is that --

16 | MR. ZAUNER: Well, let, let me say this is not
17 | relevant but really constitutes a proper rebuttal.

18 | MR. HONIG: The best that can be said then is that
19 | during some but not all of the license term, the KFUD did not
20 | apply procedures which the EEO rule required. But you'll cure
21 | that completely, otherwise, the case never would have been
22 | designated. The defense was made in the opposition. This
23 | declaration is intended squarely to respond to Mr. Cleary's
24 | testimony that we heard yesterday. It tracks that testimony
25 | as closely as we could. Mr. Cleary has, himself, identified

1 Jan Hutchinson as a person of his staff, quote, who has always
2 demonstrated her knowledge and ability, and that's on page
3 five of his declaration, so I think by offering that, KFUD has
4 waived the suggestion that she doesn't know what she's talking
5 about, otherwise, Mr. Cleary wouldn't have employed her and
6 said these kind words about her --

7 JUDGE STEINBERG: Maybe Mr. Cleary will withdraw
8 that sentence.

9 MR. HONIG: The issues that, the issues that, that
10 she speaks to are, are, are the classical music expertise
11 which Mr. Cleary said that for at least some time was a
12 requirement; what the product is, which we had a good exchange
13 about yesterday; how much time it would have taken to convert
14 the station from commercial, from non-commercial classical to
15 classical in term and, and what skills were required to do
16 that. She was the person primarily responsible for doing
17 that. The issue that Mr. Cleary raised regarding having the
18 commercial classical format all to itself, how unique is that
19 format, would the audience know about it, what special needs
20 my people have and how much skill would you have to have as a
21 sales person to know those needs. That is exactly the grist
22 of this case. It squarely responds to everything in
23 Mr. Cleary's declaration. I think every bit of it is relevant
24 and that ought all be admitted.

25 MS. SCHMELTZER: Well, as Mr. Zauner --

1 COURT REPORTER: Can I interrupt for a minute.

2 (End of tape two, start of tape three.)

3 MS. SCHMELTZER: -- His Honor had pointed out, the
4 NAACP has -- misconstrued KFUD's argument. This witness does
5 not state what the basis is for her understanding with respect
6 to KFUD's argument, and I don't think she's competent to speak
7 about it.

8 JUDGE STEINBERG: Okay. Exhibit 8 will be received.

9 (Whereupon, the document marked as
10 NAACP Exhibit No. 8 was received into
11 evidence.)

12 MS. SCHMELTZER: Your Honor, I also would like to --

13 JUDGE STEINBERG: I, okay.

14 MS. SCHMELTZER: -- then I move to strike
15 paragraph 11.

16 JUDGE STEINBERG: Wait, let me just state the basis.
17 It's received because I believe that it, it constitutes
18 rebuttal to Mr. Cleary's exhibit. Again, if you want to
19 cross-examine and test her background, experience, competence
20 to make these statements, you're free to do so.

21 MS. SCHMELTZER: I would also strike paragraph 11 as
22 argumentative, irrelevant, and I think that that should all be
23 stricken.

24 MR. HONIG: If I may, Your Honor?

25 JUDGE STEINBERG: Yes, sir.

1 MR. HONIG: She, she, she works in the market.
2 She's worked in the market, and her, and her previous
3 declaration identified some of the other stations that she
4 works with, so she knows about the availability of black radio
5 professionals from a unique standpoint. Unlike some of the
6 witnesses who have been rejected, she has worked in the market
7 in the position of a, of a co-worker and colleague.

8 JUDGE STEINBERG: Okay. I'm going to deny that
9 request and I, let me just explain and this may come up later
10 too, that distinction that I draw between Exhibit 8 and
11 Exhibits 1 through whatever they were, 1, 2, 3, 4, well, 6,
12 wasn't 6 the law professor?

13 MR. HONIG: Six was the law professor.

14 JUDGE STEINBERG: That doesn't apply, 1, 1 through
15 4, is that here we have a person who was, was in the radio
16 business and is a professional who may be competent to make
17 this statement. Now you're going to have to, through
18 cross-examination, if you want to, work on that. As opposed
19 to the others who I, I, part of the reason that, not the whole
20 reason, part of the reason that those other exhibits were
21 rejected was because I didn't think the individuals are
22 competent to express those opinions. Anyway, okay. So let's
23 turn number, the next one.

24 MR. HONIG: Nine? Exhibit 9 is offered.

25 MS. SCHMELTZER: Your Honor, we object to Exhibit 9

1 as immaterial and irrelevant. Ms. Johnson applied for a
2 position in, in late January, 1990, with other black, other
3 black prospective applicants applied at the same time. There
4 was, in fact, a black woman hired for the position of
5 receptionist. So whether or not Ms. Johnson was interviewed
6 is totally immaterial to this case. We never made any
7 representations to the FCC that we had interviewed her and
8 whether, whatever our internal documents reflect, it's just
9 irrelevant to the issues.

10 JUDGE STEINBERG: Mr. Zauner?

11 MR. ZAUNER: One second, Your Honor.

12 JUDGE STEINBERG: Sure.

13 MR. ZAUNER: Your Honor, the, the Bureau also
14 objects to Exhibit 9. We don't, we don't believe that this is
15 probative of anything at issue in this proceeding.

16 JUDGE STEINBERG: Mr. Honig?

17 MR. HONIG: Two points about this. First, as we
18 heard this morning and I won't go through the whole argument,
19 as Ms. Schmeltzer said, other blacks applied. There were two
20 openings for which virtually all the applicants were black
21 and, as has been pointed out, the decision apparently was made
22 after the petition to deny was filed to, enough to in effect
23 set aside a couple of positions for blacks. She was one of
24 the applicants for those set aside positions and, as you can
25 see, she was eminently qualified but wasn't contacted

1 | afterward -- before. She, that is also offered because one of
2 | the questions at issue in this and any case involving
3 | record-keeping is the credibility of those records and the
4 | people who maintain them. There are EEO policies, and
5 | Mr. Stortz, I believe, is the person whose job it is to
6 | implement those policies and he will be a witness, and he will
7 | testify and has in his direct case that he took steps and
8 | maintained records and oversaw and directed people to be sure
9 | that, that, that the employment practices of the station would
10 | be continent with the Commission's requirements. Here is
11 | evidence that an, that, that, that the station went through
12 | the motions of papering itself internally to the extent of
13 | having an interview form with very specific scores on matters
14 | which this witness will testify personally couldn't possibly
15 | have been the subject of her evaluation because she was never
16 | interviewed. So it goes to the credibility and genuineness
17 | of, of the station's records generally. It also goes in that
18 | sense to a lesser extent to the misrepresentation issue
19 | because credibility on that issue is, is always, is always a
20 | concern.

21 | MS. SCHMELTZER: This has nothing to do with the
22 | misrepresentation issue. Mr. Honig has not shown me how this
23 | is material in any sense of the word. I feel like we're
24 | damned if we do, damned if we don't. I mean the station did
25 | hire black employees at that point in time and now Mr. Honig

1 | seems to suggest that we shouldn't have.

2 | MR. HONIG: No, that's not correct, if I may, and,
3 | and I'm not suggesting --

4 | JUDGE STEINBERG: You, just respond and briefly and
5 | then I'll rule.

6 | MR. HONIG: I'm sorry. I'm suggesting that for the
7 | seven years's license term before it took a petition to deny,
8 | minorities should have been considered and routinely. That's
9 | what this case was about. There is a case NBMC versus FCC
10 | that says you can't judge predictive effect from sudden, 11th
11 | hour initiatives, and here we have sudden, 7th, 11th hour
12 | initiatives dramatically internally papered subjected to the,
13 | the oversight of a petition to deny, with a fictitious
14 | interview. And the witness will say so personally.

15 | JUDGE STEINBERG: Exhibit --

16 | MR. HONIG: She has no motive to do so, by the way.
17 | It was hard to find her. She wasn't a disgruntled employee.
18 | She just didn't get a job and she's doing the, being a good
19 | citizen and coming forward.

20 | JUDGE STEINBERG: Exhibit 9 is rejected for the
21 | reasons stated by counsel for the Church.

22 | (Whereupon, the document referred to
23 | as NAACP Exhibit No. 9 was hereby
24 | rejected.)

25 | MR. HONIG: Exhibit 10 is offered.